

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 SUMMARY ORDER
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6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
7 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS
8 OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS
9 OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A
10 RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL
11 OR RES JUDICATA.
12

13 At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the
14 Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the
15 21st day of September, two thousand and four.
16

17 PRESENT:

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19 HON. GUIDO CALABRESI,
20 HON. ROBERT D. SACK,
21 HON. REENA RAGGI,
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23 *Circuit Judges.*
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27 UNITED STATES OF AMERICA,
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29 *Appellee,*
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31 v.
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No. 03-1645

33 STANLEY L. ABNEY,
34

35 *Defendant-Appellant*
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40 For Appellee:

SAMIDH GUHA, Assistant United States
Attorney, *for* David N. Kelley, United States
Attorney, Southern District of New York
(Laura Grossfield Birger, Assistant United

1 States Attorney, *on the brief*).

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3 For Defendant-Appellant:

COLLEEN P. CASSIDY, Legal Aid
Society, Federal Defender Division, Appeals
Bureau, New York, NY.

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8 Appeal from the United States District Court for the Southern District of New York
9 (Koeltl, J.).

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13 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
14 **DECREED** that the judgment of the District Court is **AFFIRMED**.
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18 Appellant was charged with possessing and uttering counterfeit United States currency in
19 violation of 18 U.S.C. § 472. He was convicted after a bench trial on stipulated facts. Following
20 his indictment, and prior to his bench trial, Appellant claimed that evidence against him had been
21 obtained in violation of the Fourth Amendment and *Miranda v. Arizona*, 384 U.S. 436 (1966).
22 The district court's denial of that motion to suppress is appealed. We review the district court's
23 findings of fact for clear error and its conclusions of law *de novo*.

24 It is clear that neither the Fourth Amendment nor *Miranda* is violated when a party acts in
25 a purely individual capacity. See *United States v. Bennett*, 729 F.2d 923, 924-25 (2d Cir. 1984)
26 (Fourth Amendment); *United States v. Solomon*, 509 F.2d 863, 868 (2d Cir. 1975) (*Miranda*). It
27 is certainly possible for a police officer, while acting in an off-duty capacity, to invoke state
28 authority so that the strictures of the Fourth and Fifth Amendments apply to his or her conduct.
29 *Cf. Barna v. City of Perth Amboy*, 42 F.3d 809, 816-17 (2d Cir. 1994). But on the facts of this

1 case, as found by the District Court, that did not occur.

2 We have considered all of Appellant's arguments in this case and find them without
3 merit. Accordingly, we AFFIRM the judgment of the District Court.

4 The mandate in this case will be held pending the Supreme Court's decision in *United*
5 *States v. Booker*, No. 04-104, – S.Ct. –, 2004 WL 1713654, 2004 U.S. LEXIS 4783 (Aug. 2,
6 2004), and *United States v. Fanfan*, No. 04-105, – S. Ct. –, 2004 WL 1713655, 2004 U.S. LEXIS
7 4782 (Aug. 2, 2004). Should any party believe there is a need for the district court to exercise
8 jurisdiction prior to the Supreme Court's decision, it may file a motion seeking issuance of the
9 mandate in whole or in part. Although any petition for rehearing should be filed in the normal
10 course pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Court will not
11 reconsider those portions of its opinion that address the Appellant's sentence until after the
12 Supreme Court's decision in *Booker* and *Fanfan*. In that regard, the parties will have until
13 fourteen days following the Supreme Court's decision to file supplemental petitions for rehearing
14 in light of *Booker* and *Fanfan*.

15
16 For the Court,

17 ROSEANN B. MACKECHNIE,

18 Clerk of Court

19
20 by: _____